

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 033727-79
011283-96**

Robert C. Thibeault
Sure Management Oil & Chemical Corp.
Peerless Insurance Company
American Policyholders Insurance Company

Employee
Employer
Insurer
Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Levine and Maze-Rothstein)

APPEARANCES

Wayne M. LeBlanc, Esq., for the employee
Leonard Y. Nason, Esq., for Peerless Insurance Company at hearing
Dorothy L. Gruenberg, Esq., for Peerless on brief
Karen Loughlin Foley, Esq., for American Policyholders Insurance Co.

COSTIGAN, J. Peerless Insurance Company, the first insurer in this successive insurer case, appeals from an administrative judge's decision on recommittal¹ ordering it, for the second time, to pay the employee a closed period of G. L. c. 152, § 34, benefits for one month of incapacity in 1995, and § 30 medical benefits, which the judge found were related to left knee injuries the employee had suffered in 1979. The claim against American Policyholders, the successive insurer, was again denied and dismissed.²

¹ As the decision on recommittal contains all subsidiary findings of fact and general findings set forth in the first hearing decision, filed on May 29, 1997, plus additional subsidiary findings and general findings, as required by the reviewing board's decision of recommittal, Thibeault v. Sure Oil & Chem. Corp., 12 Mass. Workers' Comp. Rep. 472 (1998), references designated "Dec." herein are to the decision on recommittal filed on January 18, 2002.

² The employee started working in building maintenance for the employer in 1977, and was still employed there at the time of the 1996 hearing. (Dec. 4.) In 1979, and until January 20, 1980, Peerless was the workers' compensation insurer for the employer. From that date at least until 1995, American Policyholders was the workers' compensation insurer for the employer. (Peerless brief, 1.) Initially, the employee filed his claim against Peerless only. However, in November, 1995, at the § 10A conference on the employee's claim, the administrative judge allowed Peerless's motion to join American Policyholders to the proceeding, pursuant to 452 Code Mass. Regs. § 1.20. (Dec. 2.)

On its second appeal in this case, Peerless again argues that the judge erred by failing to find that the employee had sustained a second industrial injury, of a cumulative nature, for which American Policyholders was liable to pay benefits. We agree, and therefore reverse the decision.

The employee injured his left knee twice in 1979, first in May and then in October. He underwent a surgical procedure during each of two periods of disability. Peerless accepted the case and paid workers' compensation benefits, including reasonable and related medical expenses, for both periods of lost time. (Dec. 4-5.) From and after his return to work for the same employer in November 1979, the employee worked "in a modified self-limiting capacity [consisting] of no heavy lifting or carrying, no climbing greater than on a six foot ladder and no roofing work." (Dec. 4.)

In January 1995, after some fifteen years of such modified work with the same employer, the employee underwent a left knee arthroscopy to unload the medial compartment. He was placed in a knee brace, and returned to work with the same limitations and restrictions as before the surgery. (Dec. 2, 5.) Based on his 1979 left knee injuries, the employee filed a claim against Peerless, seeking incapacity benefits for a one-month convalescence from that third surgical procedure in January 1995, along with medical benefits for that surgery. *Id.* Peerless denied that claim, as its coverage of the employer ended in 1980, and American Policyholders, the successive insurer, had covered the employer from that time at least until the 1995 surgery and ensuing one-month period of alleged disability. Both insurers were parties to the evidentiary hearing. (See footnote 2, *supra*.)

The administrative judge found that the employee's left knee symptoms, including pain, buckling, swelling and difficulty climbing stairs, had persisted during his fifteen years of modified work; that he had not been able to run or engage in sports since 1979; that the left knee would buckle for no particular reason; that since 1979, it had been difficult for the employee to walk up stairs; that since 1979, he had been unable to even cross his legs; and that he had been unable to return to a work capacity without restrictions and limitations throughout that period. (Dec. 6-7.) Based on those subsidiary

findings, the judge concluded that because there was no specific new industrial injury during the fifteen year period when the employee worked in a modified capacity, the first insurer was liable to pay the benefits claimed in 1995.

It is true that “ ‘where the pain or complaints following a work injury have been continuous, subsequent incapacity will usually be deemed a recurrence of the original injury, chargeable to the first insurer, despite subsequent employment predating incapacity.’ ” Burke v. Burke & Roe Enterprises, 15 Mass. Workers’ Comp. Rep. 332, 337, quoting Spearman v. Purity Supreme, 13 Mass. Workers’ Comp. Rep. 109, 112 (1999). Moreover, “[a]n employee may suffer a recurrence of incapacity which does not rise to the level of being a new industrial injury under c. 152.” Gentile v. Carter Pile Driving, Inc., 17 Mass. Workers’ Comp. Rep. 435, 438 (2003), citing Broughton v. Guardian Indus., 9 Mass. Workers’ Comp. Rep. 561, 563-564 (1995). Here, however, the sole expert medical opinion in evidence, that of the § 11A examiner, invited a different result:

At the present time it is felt that the employee’s disability is related to his two surgical procedures in 1979. At the second surgical procedure they noted he had a torn anterior cruciate ligament. That was debrided. He has basically been functioning with a cruciate deficient knee since 1979. This is what has caused the continued buckling and giving way in his knee. He has had intermittent swelling and it has gone on to develop severe degenerative joint disease in the left knee. He is at some point in the near future going to need a total knee replacement. *It is not felt that the work that he has performed has significantly contributed to his joint wear out. It is felt that his joint wear-out is due to his medial cartilage and anterior cruciate tear involved in a work related injury in May, 1979.* It is felt that he would have developed degenerative joint disease in the knee even if he had been involved in a lighter duty type of profession. It may have taken another few years to develop. *The level of activity that he was performing with the bending, stooping and climbing would be sufficient to hasten the rate of wear-out in the knee but are not felt to be cause for the wear-out in the knee.* As stated before, the cause for the wear-out in the knee are the two surgical procedures in 1979 relating to the work related injury on 5/10/79.

(Ex. 1, March 27, 1996 report of Dr. Geuss; emphasis added.) While this medical evidence does not support a *strong* causal link between the employee’s work activities after 1979 and the disputed medical treatment and incapacity in 1994 and 1995, it

nonetheless supports a sufficient causal relationship to attach liability to the second insurer. There needs to be only the slightest contribution to assign liability to an insurer on the risk at the time of later work activity. See Rock's Case, 323 Mass. 428, 429 (1948). As we stated (with no apparent effect) in Thibeault, supra, “[a]ggravation or acceleration of a pre-existing infirmity to the point of disablement is as much a personal injury as if the work had been the sole cause.” Id. at 474, citing Brightman's Case, 220 Mass. 17, 20 (1914); Donlan's Case, 317 Mass. 291, 294 (1944); and Blevin's Case, 15 Mass. App. Ct. 926 (1983).³

Because “[t]he unchallenged medical opinion of the § 11A examiner is that the employee’s work activities after the 1979 injuries and surgeries *hastened* the onset of his 1995 knee problem,” Thibeault, supra at 474 (emphasis added), that is, the progression of his degenerative joint disease, resulting in further surgery, we directed the judge on recommittal to analyze those work activities during that fifteen year period when the second insurer was on risk, to make additional subsidiary findings of fact regarding those activities, and to determine whether a cumulative injury could be found to have occurred, using the second prong of Zerofski's Case, 385 Mass. 590, 595 (1982).

The judge found that the employee’s work activities included interior painting, cleaning, wallpapering, carpentry, electrical work, laying carpet,⁴ and “whatever the

³ These cases were all decided before the 1991 enactment of § 1(7A), which provides in part:

If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant contributing cause of disability or need for treatment.

St. 1991, c. 398. As the employee’s left knee condition resulted from his two 1979 injuries, for which Peerless accepted liability, they were compensable under c. 152, rendering § 1(7A) unavailable as a defense to American Policyholders for the 1995 claim.

⁴ The judge also found that the employee “never used his left knee to straighten carpets when laying down carpeting ever since 1979.” (Dec. 7.)

apartments required for repairs.” (Dec. 7.) While a more detailed description of the physical requirements of the employee’s job duties would have helped, the judge did find that after the 1979 work injuries, the employee limited his carrying of heavy objects and his climbing of a lot of stairs at one time at work, and that he experienced “no incidents at home or at work or anywhere else” that caused him to seek further treatment of his left knee with an orthopedic surgeon. (*Id.*) As he had in his original decision, the judge concluded:

I adopt the medical opinion of Dr. Guess [sic], the impartial physician. I do not find incidents at work in 1994 and 1995 that manifest a causal relationship to the employee’s incapacity in January and February of 1995. I find that the period of incapacity in 1995 is simply the result of a natural physiological progression from the 1979 industrial injury and is not the result of a new compensable injury. [Citations omitted.]

I find no specific incidents of re-injury or further injury at work in 1994 and 1995; I find the employee’s knee continued to deteriorate as a result of the 1979 industrial injuries and that the employee’s incapacity is directly attributable to those 1979 industrial injuries. [Citation omitted.]

I do not find that Mr. Thibeault sustained an injury at work for the employer subsequent to 1979 from an identifiable condition that is not common to all or a great many occupations. *I note that Mr. Thibeault’s work was as he characterizes it to be a “jack of all trades.” The inference is that the conditions of his work since 1979 were in fact common and necessary to a great many occupations. (Zerofski’s Case 385 MASS 590) [sic].*

I do not find that Mr. Thibeault’s subsequent work activities since 1979 worsened his condition. I find that Mr. Thibeault’s complaints of pain, swelling, buckling, [and] numbness associated with his left knee have been continuous since 1979 and support a conclusion that the current left knee impairment of Mr. Thibeault is causally related to the original 1979 industrial injuries.

(Dec. 8-9; emphasis added.)

Based on the very findings he made as to the employee’s post-1979 work activities, the judge’s inference that “the conditions of his work since 1979 were in fact common and necessary to a great many occupations” is impermissible and contrary to law. No proper equation can be drawn between the employee’s characterization of

himself as “a jack of all trades,” and the conclusion that his work activities were therefore common and necessary “to all or a great many occupations,” rendering his fifteen years of work mere wear and tear:

The line between compensable injury and mere “wear and tear” is a delicate one, as a comparison of the results reached in past decisions reveals. Nevertheless, the distinction is necessary to preserve the basic character of the act. . . . The distinction between compensable and noncompensable injuries, however, involves more than the factual problem of causation. In some cases work may be a contributing cause of injury, but only to the extent that a great many activities pursued in its place would have contributed. When this is so, causation in fact is an inadequate test.

Drawing from the nature of the purposes of the act as we have described them, and from the pattern of our decisions over the years, we arrive at the following restatement of the range of harm covered by the act. To be compensable, the harm must arise either from a specific incident or series or incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment.

Zerofski, supra at 594-595. There are but a few identifiable conditions which have been deemed common and necessary to all or a great many occupations. Id.(prolonged standing and walking); Aetna Life & Cas. Ins. Co. v. Commonwealth, 50 Mass. App. Ct. 373 (2000)(sitting in one position for extended periods of time); Adams v. Contributory Retirement Appeal Bd., 414 Mass. 360 (1993)(continual periods of walking and standing and frequent bending over).⁵

⁵ Conversely, frequent, repetitive motion can give rise to compensable harm in the nature of cumulative injury. See, e.g., Taylor v. Morton Hosp. & Med. Ctr., 16 Mass. Workers’ Comp. Rep. 30 (2002), citing Trombetta’s Case, 1 Mass. App. Ct. 102 (1973)(personal injury may gradually develop from the cumulative effect of work stresses and aggravations); Andrade v. Joseph Pollack Corp., 15 Mass. Workers’ Comp. Rep. 222 (2001)(in context of repetitive work injury, for purpose of successive insurer liability, “second injury” occurred first time employee performed job duties after second insurer came on risk; each day of continuous, repetitive trauma on the job caused further deterioration and accumulation of injurious effects of work over prolonged period of time).

Here, the judge erred by apparently confusing the “all or a great many occupations” component of the Zerofski formulation, with the employee’s self-described “jack of all trades” character of his employment. His multiple work duties -- as an electrician, carpenter, painter, carpet layer, and general maintenance man -- involve identifiable physical demands not common or necessary to all or a great many occupations. These are so far beyond prolonged standing, walking, sitting and frequent bending, as to render the Zerofski “wear and tear” bar to compensability wholly inapplicable; it simply is not triggered because multiple identifiable conditions attach to one job.

Accordingly, based on the very facts found by the judge, and the sole expert medical opinion in evidence, we hold as a matter of law that the employee sustained a further injury to his left knee, arising out of and in the course of his employment for the employer between January 20, 1980 and January 12, 1995, for which the successive insurer, American Policyholders, is liable. Pursuant to § 15A,⁶ American Policyholders is ordered to make reimbursement to Peerless of the benefits it paid to or on behalf of the employee, and the attorney’s fees and expenses it paid to employee’s counsel, pursuant to the judge’s hearing decision.

Pursuant to § 13A(6), American Policyholders is directed to pay employee’s

⁶ General Laws c. 152, § 15A, as appearing in St. 1955, c. 174, § 5, provides:

If one or more claims are filed for an injury and two or more insurers, any one of which may be held liable to pay compensation therefor, agree that the injured employee would be entitled to receive such compensation but for the existence of a controversy as to which of said insurers is liable to pay the same, such one of said insurers as they may mutually agree upon or as may be selected by a single member of the board shall pay to the injured employee the compensation aforesaid, pending a final decision of the board as to the matter in controversy, and such decision shall require that the amount of compensation so paid shall be deducted from the award if made against another insurer and be paid by said other insurer to the insurer agreed upon or selected by the single member as aforesaid. If, however, said insurers cannot agree that such employee would be entitled to compensation irrespective of the existence of such controversy, then a hearing to determine the question of liability and the payment of compensation shall be held forthwith by the division, such hearing to take precedence over other pending matters.

Robert C. Thibeault
Board Nos. 033727-79 & 011283-96

counsel a legal fee of \$1,276.27, plus necessary expenses.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

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